A **AMBANK (M) BHD v. BADRUL KAMAR BAHARUM & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[JUDICIAL REVIEW NO: R-25-146-05-2015]
28 JUNE 2016

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LABOUR LAW: *Employment – Dismissal – Absenteeism – Medical certificate – Employee unfit for work – Failure to inform employer about medical certificate – Termination from employment – Whether employee deprived of opportunity to tender medical certificate – Whether termination with just cause or excuse –* C *Employment Act 1955, s. 60F(2)(b)*

The first respondent ('Badrul') was employed by the applicant ('AmBank'). Following an angiogram procedure in December 2010, Badrul was certified as being unfit for work until Friday, 24 December 2010. However, Badrul did not attend work the following Monday, *ie,* 27 December 2010 as he was D still unwell. On Tuesday 28 December 2010, Badrul was still unfit for work. This time, he visited one of AmBank's panel clinics and obtained a medical certificate. Badrul alleged that his attempt to inform his supervisor ('Teh') and Teh's secretary ('Melisa') about his absence was futile. Badrul was required to be in office by 8.45am each working day. However, on E 29 December 2010, while Badrul was on his way to work sometime after 9am, he received a call from the Industrial Relations Executive at AmBank ('Vijaya'), informing him that he had been dismissed with immediate effect. The Industrial Court held that Badrul had been dismissed without just cause or excuse and ordered AmBank to pay backwages and compensation *in lieu* F of reinstatement to Badrul. AmBank, therefore, sought an order of *certiorari* against the Industrial Court's decision.

Held (dismissing application for *certiorari* with costs):

(1) Having regard to the circumstances of the case and to the principles of G good conscience and equity, the act of AmBank to dismiss Badrul without notice was overly drastic and excessive. Badrul was unwell and had undergone an angiogram procedure. Even though Badrul was at fault for not obtaining a medical certificate for his absence on Monday 27 December 2010, and for failing to notify AmBank of his medical certificate for 28 December 2010, AmBank's action in dismissing Badrul H for absenteeism itself amounted to a breach of the terms of the contract of employment. (para 63)

(2) The Industrial Court made a finding of fact that Vijaya had called Badrul on the morning of 29 December 2010 informing him that he had been I terminated. There was no reason to disturb this particular finding of fact, as the Chairman had the opportunity to consider the credibility of the conflicting testimonies. The fact that Badrul was terminated on the morning of 29 December 2010 deprived him of the opportunity to tender his medical certificate for 28 December 2010.

(3) Under s. 60F(2)(b) of the Employment Act 1955 ('Act'), an employee has 48 hours from the commencement of the sick leave to inform his employer of such leave. If Badrul had not been terminated, Badrul would have had until 8.45am on 30 December 2010 to inform AmBank, on the basis that his sick leave for 28 December 2010 would have commenced at the start of the work day. Thus, if Badrul had gone in to work at any time on 29 December 2010 and informed AmBank of his medical certificate for 28 December 2010, he would have complied with the requirements of s. 60F(2)(b) of the Act, and his absence on 28 December 2010 would not have been deemed to have been one that was without reasonable excuse. (para 63)

(4) Section 13(2) of the Act entitles an employer to terminate an employee's contract of service without notice in the event of any wilful breach of a condition of the contract of service. In this case, the employee had been ill. An illness could not give rise to a wilful breach on the part of the employee. If an employee had persistently and deliberately failed to inform the employer of his illness, a right may have arisen in favour of the employer entitling dismissal, but not otherwise. (para 63)

Case(s) referred to:

Dharmaraja v. Asian Ceramic Sdn Bhd & Anor [2000] 5 CLJ 307 HC ***(refd)***
Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***
MHS Aviation Sdn Bhd v. Zainal Akmar Mohd Noor [2001] 2 ILR 336 ***(refd)***
Quebec Railway, Light, Heat & Power Co v. Vandry [1920] AC 662 ***(refd)***
R v. Secretary of State for the Environment and Another, ex p Powis [1981] 1 All ER 788 ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 3 CLJ 310 CA ***(refd)***
Regional Centre for Arbitration v. Ooi Beng Choo & Anor [1999] 1 CLJ 819 HC ***(refd)***
Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***
Syarikat Permodalan Kebangsaan Bhd v. Mohamed Johari Abdul Rahman [2004] 2 ILR 803 ***(refd)***
Tsuritani (Malaysia) Sdn Bhd Melaka v. Sha'ari Sahat & Ors [2001] 1 ILR 111 ***(refd)***
Vignaeswaran Shanmuganathan v. TNB Engineers Sdn Bhd [2009] 1 ILR 406 ***(refd)***
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

Legislation referred to:

Capital Markets and Services Act 2007, s. 216(3)
Employment Act 1955, ss. 13(2), 15(2), 58A, 60F(1), (2)(a), (b)
Evidence Act 1950, ss. 4, 103, 114(g)
Industrial Relations Act 1967, ss. 20(1), 30(5)
Interpretation Acts 1948 and 1967, s. 17A

For the applicant - A Ramadass & M Jothi; M/s Ramadass & Assocs
For the respondents - VK Raj; M/s P Kuppusamy & Co

Reported by Sandra Gabriel

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JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] The applicant, AmBank (M) Bhd (AmBank), sought an order of *certiorari* to quash an award of the Industrial Court[1] made in favour of the first respondent, En Badrul Kamar Baharum (referred to here variously as En Badrul, the claimant or the respondent). Until his dismissal, En Badrul had been employed by AmBank as an "office boy", a position that might be more appropriately described in these enlightened times as a general clerk.

Background Facts

[2] The material background facts of this case are as follows.

[3] En Badrul, who appears to have a long history of illness, underwent an angiogram procedure in December 2010, and was certified as being unfit for work until 24 December 2010, which was a Friday. The relevant medical certificates were obtained and are not in dispute.

[4] On the following Monday, 27 December 2010, he did not attend work. He testified before the Industrial Court that he was still unwell and had attempted to contact his supervisor Mr Teh Khiang Chye by telephone, but Mr Teh was unavailable. He further testified that he had then informed Mr Teh's secretary, Cik Melisa, that he had wanted to apply for emergency leave for that day. Cik Melisa was not called to give evidence.

[5] En Badrul did not attend work on 28 December 2010 either. This time, he visited one of AmBank's panel clinics, and obtained a medical certificate. At the Industrial Court, he testified that he did not inform his employer of the fact that he was on medical leave but had asked his wife to do so. Before me, counsel for the applicant submitted that this was an unpleaded fact. En Badrul's wife was not called to testify before the Industrial Court.

[6] Under the terms of his employment, En Badrul was required to be in office by 8.45am each working day. It was not in dispute that, on Wednesday, 29 December 2010 En Badrul was not in office on time. His version of events was that, while he was on his way to work sometime after 9am[2], he had received a call from Ms Vijayakumari Suppiah, an industrial relations executive at AmBank, informing him that he need not come in to work as he had been dismissed with immediate effect. He also claimed that he was informed that the letter of termination would be posted to him.

[7] AmBank disputed En Badrul's account of events. According to Ms Vijaya, she had attempted to call the claimant on the morning of 29 December 2010 to find out his whereabouts (and not to inform him that he had been dismissed), but could not get through. In her witness statement, Ms Vijaya stated that En Badrul's phone was "on off mode and it was not

ringing". However, in cross-examination, Ms Vijaya contradicted herself and stated that the phone had rung but the call was not picked up. Ms Vijaya further testified that she only came to know that the claimant had been dismissed on the evening of 29 December 2010, and hence – argued counsel for AmBank – it would not have been possible for her to have told En Badrul in the morning that he had been dismissed.

[8] A letter of termination was prepared and dated on 29 November 2010. En Badrul received it by post. It is not clear from the evidence when En Badrul received this letter, but it would be reasonable to conclude that he would have received it several days after 29 December 2010. Indeed, the learned Chairman of the Industrial Court made a finding to this effect[3].

[9] The material portion of the termination letter is reproduced below:

> It has been reported to us that you have been absent from work since 27.12.2010 and failed to inform or attempted to inform your superior the reason (s) for your absenteeism. Meanwhile all attempts made by your superior to contact you were futile as you did not answer your handphone.
>
> Since this is not the first time you were absent from work without prior leave, the Management has decided to terminate your services for abandonment of contract with immediate effect by virtue of Section 15(2) to be read in conjunction with 13(2) of the Employment Act 1955.
>
> Since you had abandoned your contract of service on your own accord, as per your terms of your Employment of Contract, you are required to indemnify the Bank One (1) month salary *in lieu* of your notice period.

[10] Section 15(2) of the Employment Act 1955 provides:

> (2) An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

[11] The position of AmBank was that:

(a) En Badrul had been absent from work on 27, 28 and 29 December 2010 without reasonable excuse; and

(b) moreover, even if he did have a reasonable excuse, he failed to inform or to attempt to inform AmBank of such excuse.

Before The Industrial Court

[12] En Badrul lodged a complaint with the Director General of Industrial Relations under s. 20(1) of the Industrial Relations Act 1967. His complaint was eventually referred to the Industrial Court, which held that En Badrul had been dismissed without just cause or excuse and ordered AmBank to pay back wages and compensation *in lieu* of reinstatement.

[13] The following summarises the findings of the learned Chairman of the Industrial Court:

(a) on the events of 27 December 2010:

(i) the Industrial Court accepted En Badrul's testimony regarding his state of ill health, having just undergone an angiogram and having exhausted his post-hospitalisation medical leave, and found that this constituted a reasonable excuse for the purposes of s. 15(2) of the Employment Act 1955 for his absence from work (despite the fact that no medical certificate was obtained by En Badrul);

(ii) the Industrial Court made a finding of fact that En Badrul had indeed attempted to contact Mr Teh in order to obtain permission for emergency leave, but failed to reach him; and

(iii) the Industrial Court made a finding of fact that En Badrul had left a message with Ms Melisa, Mr Teh's secretary;

(b) on the events of 29 December 2010, the Industrial Court considered the conflicting testimonies of En Badrul and Ms Vijaya, and preferred that of En Badrul as being more inclined to the truth. The learned chairman noted the contradictions in the testimony of Ms Vijaya regarding whether she had heard a ringing tone or not, and noted that the whole of the testimony of Ms Vijaya had raised doubts. The learned chairman observed that, if it was true that Ms Vijaya had not told En Badrul that he was dismissed, then there would have been no reason for him not to have turned up for work on 29 December 2010. (Indeed, the further observation may be made that, if the applicant's version of events were to be believed, the first time that the dismissal would have been communicated to En Badrul would have been when he received the letter of termination, which would have been several days after 29 December 2010, which does not explain why he had not turned up for work in the succeeding few days); and

(c) the chairman found that AmBank had failed to prove, on a balance of probabilities, that the dismissal of En Badrul was with just cause or excuse, and ordered AmBank to pay back wages and compensation *in lieu* of reinstatement in the amount of RM62,070.

[14] No specific finding of fact was made in connection with the events of 28 December 2010, on whether En Badrul had indeed informed his wife to contact AmBank to inform it of his medical leave.

Summary Of Findings Of This Court

[15] The following summarises the findings of this court:

(a) the learned Chairman of the Industrial Court had committed an error of law in failing to consider the effect of s. 60F(2) of the Employment Act 1955 in relation to the respondent's absence from work on 27 December

2010. Section 60F(2)(a) creates an irrebuttable presumption of law that a person who goes on sick leave without having first obtained a medical certificate is deemed to be absent without the permission of his employer and absent without reasonable excuse. It was therefore not open to the chairman to make a finding that En Badrul had a reasonable excuse for his absence on Monday, 27 December 2010;

(b) the respondent would have been precluded from adducing evidence regarding the purported fact that he had asked his wife to inform AmBank of the fact that he had obtained a medical certificate for Tuesday, 28 December 2010, on the basis that such fact had not been pleaded in the statement of case;

(c) in order for an employee to be deemed to be in breach of his contract of service pursuant to s. 15(2) of the Employment Act 1955, the employee must have been absent without reasonable excuse for at least two full consecutive workings days, plus any part of a third day;

(d) it was not in dispute that En Badrul was not present at work at 8.45am on Wednesday, 29 December 2010, which was the time that he was required to be present at work, which meant that he was deemed by virtue of s. 15(2) of the Employment Act 1955 to have been in breach of his contract of service;

(e) that an employee is absent in a manner that triggers the deeming provision of s. 15(2) does not, without more, entitle the employer to terminate the services of the employee as of right, as the circumstances surrounding the absence must also be considered;

(f) in this particular instance, En Badrul was genuinely unwell, and had in fact obtained a medical certificate for one of the days on which he was absent. Because he was terminated on Wednesday, 29 December 2010, En Badrul was also deprived of the opportunity of tendering his medical certificate to AmBank and informing it of his medical leave. Under s. 60F(2)(b) of the Employment Act 1955, he would have had until 8.45am on Thursday, 30 December 2010 to do so, which in turn would have provided a reasonable excuse for his absence on 28 December 2010. Accordingly, having regard to these circumstances, AmBank was not entitled to terminate the services of the respondent and therefore the dismissal was without just cause or excuse; and

(g) an illness on the part of an employee should not give rise to a right of an employer to terminate, without notice, his contract of service pursuant to s. 13(2) of the Employment Act 1955 for wilful breach of a condition of the contract of service, except in the extreme case where an employee had persistently and deliberately failed to inform the employer of his illness. For this reason also, the applicant's dismissal of En Badrul was without just cause or excuse.

[16] The reasoning is set out in full in the following paragraphs.

Analysis

[17] Ten grounds were advanced for the applicant on why an order of *certiorari* should be granted by this court to quash the decision of the Industrial Court. Some of the grounds are duplicative or overlapping, and a number of them are not determinative of the issues at hand. Accordingly and in the interests of clarity, I will consider the legal issues arising in respect of each of days in which En Badrul was absent from work, in concordance with the manner in which the issues have been set out in the written submissions of counsel for the applicant.

Absence On 27 December 2010

[18] The first ground on which AmBank sought to challenge the award was that the Industrial Court failed to take into account the purported fact that En Badrul did not adduce any evidence to show that he had called Mr Teh regarding his absence on 27 December 2010.

[19] Before the Industrial Court, there was, on the one hand, testimony from En Badrul that he had attempted to call Mr Teh on 27 December 2010 but had failed to get through to him. He then informed Cik Melisa that he intended to obtain emergency leave. Against this, Mr Teh had testified that he had not received a call from Mr Badrul on that day and that he had told by Cik Melisa that En Badrul had not contacted her.

[20] The relevant finding of the learned chairman is set out in the following passage of the award:

> Berdasarkan keterangan-keterangan di atas adalah dapatan Mahkamah bahawa Pihak Menuntut telah tidak hadir bekerja pada 27 hingga 29 Disember 2010. Fakta ini diakui sendiri oleh Pihak Menuntut. Mahkamah juga mendapati Pihak Menuntut telah berusaha menghubungi Encik Teh Kheng Chye pada pagi 27 Disember 2010 untuk mendapat kebenaran cuti kecemasan tetapi gagal dihubungi dan pesanan telah ditinggalkan kepada setiausahanya Cik Melisa. Di sini juga Mahkamah menerima keterangan Pihak Menuntut tentang keadaan kesihatannya yang baru saja menjalani rawatan angiogram dan cuti sakit telah habis. Ini disokong oleh cuti sakit yang diperolehi pada hari berikutnya iaitu 28 Disember 2010 oleh Klinik Idzham (rujuk SOC – UB5). Mahkamah juga menerima penjelasan Pihak Menuntut mengenai alasan tidak hadir pada 29 Disember 2010 seperti yang telah dihuraikan di atas.

[21] In my judgment, this aspect of the decision of the learned chairman does not suffer from the infirmities as alleged by counsel for AmBank, as it cannot be said that the decision is not supportable by the evidence before the learned chairman. This case is clearly one where the Industrial Court had made an evaluation of the credibility of the witnesses who had provided conflicting testimonies. A determination of a point of fact that has been made

following an assessment of the credibility of witnesses would not be open to intervention by this court: see *William Jacks & Co (M) Sdn Bhd v. S Balasingam*[4]. A

[22] Counsel for the applicant rightly pointed out that the evidential burden of a fact in issue lies with the party alleging that fact to be true, in accordance with s. 103 of the Evidence Act 1950. Thus, even though the overall burden of proof lay with AmBank to show that the dismissal was without just cause or excuse, the evidential burden of proving that a call had been made to Mr Teh and/or Cik Melisa lay with the claimant, En Badrul. This is on the basis that it was he who had claimed that he had called them. B

[23] Be that as it may, I do not find that the Industrial Court had misdirected itself on the incidence of the evidential burden. The learned chairman found favour with the testimony of En Badrul after due consideration of the evidence before her. Nowhere in the award did she state that the burden of proving the alleged fact that no calls had been made lay with AmBank. C D

[24] On the issue of the failure to invoke the presumption under s. 114(g) of the Evidence Act 1950 for the failure by En Badrul to call Cik Melisa as a witness: it is settled law that the invocation of a statutory presumption is matter of discretion on the part of a court[5]. Such a discretion must of course be exercised judiciously. The question before this court is whether the decision not to invoke the statutory presumption is one that no reasonable tribunal, similarly circumstanced, would have arrived at. I am not satisfied that this is the case, hence the AmBank's challenge on this ground must fail. E

[25] I remind myself that this court is concerned not with the question of whether it would have exercised the discretion differently, but rather whether the decision not to invoke the statutory presumption is an unreasonable one. F

[26] It will be noted that, as far as the absence on 27 December 2010 is concerned, there are two related but distinct issues: first whether the respondent had a reasonable excuse for his absence from work and second, whether he had informed or attempted to inform AmBank of such excuse. The second of these have been addressed in the preceding paragraphs. It is convenient to now deal with the former issue; whether En Badrul had reasonable excuse for his absence on 27 December 2010. G H

[27] Counsel for the applicant argued that the Industrial Court erred in law and/or fact when it made an assumption that since En Badrul had recently undergone a medical procedure, it was likely that he was still unwell on 27 December 2010 and that this constituted reasonable excuse for his absence on this date for the purposes of s. 15(2) of the Employment Act 1955. It was further argued that the Industrial Court failed to give due I

consideration to the fact that En Badrul had not obtained medical leave for 27 December 2012 (although he subsequently obtained a medical certificate for the following day, Tuesday, 28 December 2010).

[28] An employee may avail himself to the exclusion in s. 15(2) if (among others) he had a reasonable excuse for his absence from work.

[29] Section 60F(2) of the Employment Act 1955 provides for the circumstances in which an employee is deemed to have been absent without reasonable excuse, which includes the situation where his sick leave is not supported by a certificate from a duly registered medical practitioner. Section 60F(2) reads as follows:

> (2) An employee who absents himself on sick leave:
>
> (a) which is not certified by a registered medical practitioner or a medical officer as provided under subsection (1) or a dental surgeon as provided under subsection (1A); or
>
> (b) which is certified by such registered medical practitioner or medical officer or a dental surgeon, but without informing or attempting to inform his employer of such sick leave within forty-eight hours of the commencement thereof,
>
> shall be deemed to absent himself from work without the permission of his employer and without reasonable excuse for the days on which he is so absent from work.

[30] Section 60F is contained within Part XII of the Employment Act 1955. Section 58A of the Act deals with the applicability of Part XII. In essence, section 58A provides that the statutory terms of employment contained in Part XII do not override the terms of any applicable collective agreement entered into before 1 October 1980, which was the date on which Part XII came into force.

[31] The question is therefore whether the employee's terms of service regarding sick leave is provided for in an collective agreement that was entered into prior 1 October 1980. If yes, then those provisions in the collective agreement apply. If no, then s. 60F(2) applies.

[32] There was no evidence before the Industrial Court on whether any collective agreement applied in relation to En Badrul's terms of employment, perhaps unsurprisingly so, as s. 60F(2) had escaped the attention of both counsel and hence the Industrial Court had no occasion to consider its applicability.

[33] I invited counsel to consider whether it was open to the parties to adduce fresh evidence before this court in a judicial review application. Based on the decision in *R v. Secretary of State for the Environment and Another, ex p Powis*[6], the categories of fresh evidence that are admissible on a judicial review were limited to (a) evidence to show what material was before the person making the decision; (b) evidence required to determine a

jurisdictional or procedural error; and (c) evidence of misconduct by a party or the person making the decision. But fresh evidence is not admissible to show that the person making the decision had been misled by the failure, short of fraud, of a party to put before him evidence which would probably have caused him to come to a different conclusion. The decision in *R v. Secretary of State for the Environment and another, ex p Powis* was followed by the Malaysian High Court in *Regional Centre for Arbitration v. Ooi Beng Choo & Anor*[7].

[34] Accordingly, I am of the view that no fresh evidence can be adduced in the judicial review proceedings before me to prove the existence of any applicable collective agreement. The purpose for which such evidence would be adduced would not have been included in the three categories specified in *ex parte Powis (supra)*, but would have been to show that the Industrial Court would have come to a different conclusion had the evidence been available before it.

[35] In the absence of any evidence regarding the existence of any applicable collective agreement, the Industrial Court ought to have applied the deeming provision in s. 60F(2)(a), as it was not in dispute that En Badrul had not obtained a medical certificate for 27 December 2010. His absence from work should have been regarded by the Industrial Court as being devoid of reasonable excuse.

[36] The question may be asked as to the legal effect of the deeming provision in s. 60F(2). Does the provision merely provide for a rebuttable presumption of fact a – mere rule of evidence – or does it provide for an irrebuttable presumption of law that a non-certified sick leave can never amount to reasonable excuse?

[37] In my judgment, having regard to the construction of the Employment Act 1955, s. 60F(2) is intended to create an irrebuttable presumption, that is, a rule of law and not merely of evidence.

[38] Although s. 4 of the Evidence Act 1950 provides for the interpretation of presumptions, it is of no assistance here as s. 4 only applies to provisions contained in the Evidence Act 1950. This section is nonetheless useful to explain the differences between permissive presumptions, a rebuttable presumption of fact and irrebuttable presumptions of law.

[39] Based on the plain words of s. 60F(2), no accommodation is made for the possibility of evidence being adduced to rebut the deeming provision. In other statutes, where Parliament had intended to create rebuttable presumptions, the form of words will make this explicit. If an example is required, reference can be made to the interpretation of the phrase "persons acting in concert" in the Capital Markets and Services Act 2007, s. 216(3) of which provides:

A (3) Without prejudice to the generality of subsection (2), the following persons shall be presumed to be persons acting in concert **unless the contrary is established:**

… (emphasis added)

B **[40]** Having had regard to the purpose and intent of the legislation (which this court is entitled to do pursuant to s. 17A of the Interpretation Acts 1948 and 1967), I would also favour an interpretation that s. 60F(2) creates an irrebuttable legal presumption. This must necessarily be the case, since s. 60F(1) provides in detail for the circumstances where an employee may be entitled to sick leave. Any contrary interpretation would not only be C inconsistent with s. 60F(1), but would also abrogate its very effect.

[41] In my judgment, the learned chairman fell into error when she came to the conclusion that En Badrul's absence on 27 December 2010 was with reasonable excuse. In the light of s. 60F(2) of the Employment Act 1955, it was not open to the chairman to make such a finding, as no medical D certificate had been obtained. The respondent is deemed, by s. 60F(2) to have been absent without reasonable excuse and no evidence to the contrary may be adduced to establish otherwise.

[42] It is apparent to me that s. 60F(2) had not been considered by the E Industrial Court nor raised in argument before it. Additionally, it had not been pleaded in the applicant's statement in reply in the proceedings before the Industrial Court. However, such omission is not fatal to *AmBank*'s case, as there is no requirement on parties in an action to plead the law.

[43] My finding of an error of law on the part of the learned chairman does F not necessarily mean that *certiorari* will lie against the award of the Industrial Court. En Badrul can only be considered to have breached the terms of his employment contract if he had been absent for more than two consecutive days. Based on the foregoing analysis, it is established that he did not have any reasonable excuse for his absence on Monday, 27 December 2010. I now G consider the issues surrounding his absence on Tuesday, 28 December 2010.

Absence On 28 December 2010

[44] Counsel for the applicant posited that the Industrial Court erred in law and/or fact when it failed to give due consideration to the fact that En Badrul had not stated in his statement of case that he had informed or attempted to H inform AmBank that he was on medical leave on 28 December 2010.

[45] En Badrul's testimony that he had informed his wife to call AmBank only arose in cross-examination[8].

[46] It is trite law that parties are bound by their pleadings. The rules I relating to pleadings in Industrial Court cases – perhaps paradoxically given the provisions of s. 30(5) of the Industrial Relations Act 1967 – are even more stringent than that applicable in other civil cases, where an opponent's failure to immediately object to evidence that is at variance to a party's

pleaded case will mean that the opponent will lose the right to object at any later stage. Based on the Court of Appeal's decision in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd*[9] (subsequently affirmed by the Federal Court[10]), the exception to the general rule on pleadings established in *Superintendent of Lands and Survey, 4th Division & Anor v. Hamit Matusin & Ors*[11] has no application in an Industrial Court context.

[47] Therefore the failure of counsel for AmBank at the Industrial Court hearing to object to the evidence of En Badrul is immaterial.

[48] I have had the opportunity on another occasion to make observations[12] on the decision in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd*, and see no need to repeat them here. Suffice to say that this court is bound by the decisions of the Court of Appeal and the Federal Court in that case.

[49] As alluded to in para. 14 *ante*, a careful examination of the award will reveal that the learned chairman did not come to a specific finding on whether En Badrul had informed or attempted to inform AmBank of the fact that he had obtained a medical certificate for 28 December 2010. This is perhaps unsurprising, as the learned chairman had already made a finding that, in respect of his absence on 27 December, En Badrul had had a reasonable excuse and had attempted to inform AmBank of this fact. Hence, it was not necessary for the Industrial Court to make a specific finding regarding the events of 28 December.

[50] The closest that the learned chairman comes to making a finding of fact regarding the question of whether En Badrul had informed or attempted to inform his employer was in the last paragraph of p. 12 of the award[13], where the chairman stated:

> Persoalan di sini adakah pihak menuntut telah berusaha untuk cuba memberitahu pihak atasannya Encik Teh Khiang Chye mengenai ketidakhadirannya pada 27 dan 28 Disember 2010. Pihak menuntut mengatakan dia cuba menelefon Encik Teh Khiang Chye tetapi gagal dihubungi lalu pihak menuntut memberitahu setiausahanya Cik Melisa yang dia ingin mohon cuti kecemasan pada hari itu. Dia meminta Cik Melisa untuk menyampaikan kepada Encik Teh Khiang Chye. Bagi cuti sakit yang diperolehi pada 28 Disember 2010 pihak menuntut tidak ada menelefon pihak bank mengenainya tetapi telah menyuruh isterinya berbuat demikian.

[51] In my view, the last sentence in the paragraph quoted above is not a finding by the Industrial Court, but merely a review of the evidence offered by the claimant.

[52] As can be seen from the passage quoted at para. 50 *ante*, in as far as the findings of the Industrial Court was concerned, no specific conclusion had been arrived at in regards to the issue of whether the Industrial Court accepted En Badrul's testimony that he had asked his wife to inform AmBank.

[53] In my judgment, as this point of fact had not been pleaded in his statement of case, En Badrul could not have successfully maintained that he had, *via* his wife, informed AmBank of his medical certificate for 28 December 2010.

Absence On 29 December 2010

[54] En Badrul's absence on Wednesday, 29 December 2010 is a relevant consideration because s. 15(2) of the Employment Act 1955 deems it a breach of the terms of an employment contract if an employee is absent "for more than two consecutive working days". The applicant took the view that, if on the morning of the third day the employee does not show up for work, then s. 15(2) deems a breach to have occurred.

[55] In the case of *Vignaeswaran Shanmuganathan v. TNB Engineers Sdn Bhd*[14], the Industrial Court held that the absence of two consecutive working days only was insufficient to trigger the deeming provision in s. 15(2); there must have been an absence of more than two days.

[56] Mr VK Raj for the respondent argued that "more than two consecutive working days" means three consecutive working days or more. As such – according to learned counsel – a breach can only be taken to have occurred if the employee was absent for the whole of the third day.

[57] Support for this proposition can be found in the Industrial Court case of *Tsuritani (Malaysia) Sdn Bhd Melaka v. Sha'ari Sahat & Ors*[15], where the Industrial Court stated:

> It is the company's contention on the third day they must be considered to have been absent because they did not do any work. In the court's opinion the issue is not whether they did any work but whether they were absent or present. It is also the company's submission that in any event they were absent for at least half of a day when they were demonstrating outside the factory. Therefore it is more than two days ie, two and a half days. In the court's opinion it has to be absence for a complete day.

[58] With respect, I am unable to agree with this interpretation of s. 15(2). The plain words used in that section are clear, in that there must have been absence without reasonable excuse for more than two consecutive working days, ie, for two full consecutive workings days, plus any part of a third day. If Parliament had intended these words to mean three consecutive days or more, then it would have said so. In the words of Lord Sumner in *Quebec Railway, Light, Heat & Power Co v. Vandry*[16], a decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of Canada:

> … effect must be given, if possible, to all the words used for the Legislature is deemed not to waste its words or to say anything in vain.

[59] In any event, the decision of the learned President in Tsuritani was ultimately quashed by the Court of Appeal, although it is not clear whether the issue of the computation of days under s. 15(2) was canvassed before the Court of Appeal[17].

[60] In the present case, it is not in dispute that En Badrul was not present at work at 8.45am on Wednesday, 29 December 2010, which was the time that he was required to be present at work. It can also be seen from the preceding paragraphs that he did not have any reasonable excuse for his absence on the preceding two days, for the reasons explained earlier. It therefore follows that En Badrul would have been deemed by virtue of s. 15(2) of the Employment Act 1955 to have been in breach of his terms of employment for the reason that he was not present at work at the time that he was supposed to have been at work on the third day.

Whether Termination Was With Just Cause Or Excuse

[61] Now, it does not necessarily follow that a breach of the terms of employment by an employee will *ipso facto* entitle the employer to dismiss the employee.

[62] In *Dharmaraja v. Asian Ceramic Sdn Bhd & Anor*[18], the High Court was of the view that an absence of two consecutive days does not entitle the employer company to terminate the employee as of right, and that the circumstances surrounding the absence must be considered. Similarly, in *Syarikat Permodalan Kebangsaan Bhd v. Mohamed Johari Abdul Rahman*[19], the Industrial Court opined:

> That absenteeism *per se* should lead to dismissal cannot reflect true industrial jurisprudence. Whilst absenteeism is an actionable misconduct, punishment will depend on the circumstances of each case.

[63] I am of the view that, in the present case, AmBank was not entitled to terminate the services of En Badrul in the manner that it had because of the following reasons:

(a) having regard to the circumstances of the case and to the principles of good conscience and equity, the act of AmBank to dismiss him without notice was overly drastic and excessive. It was not disputed that En Badrul was unwell, and had in fact undergone an angiogram procedure. Even though En Badrul was at fault for not obtaining a medical certificate for his absence on 27 December, and for failing to notify AmBank of his medical certificate for 28 December, the applicant's action in dismissing him for absenteeism itself amounted to a breach of the terms of the contract of employment.

It will be recalled that the Industrial Court made a finding of fact that Ms Vijaya, AmBank's IR executive, had called En Badrul on the morning of 29 December 2010 informing him that he had been terminated. I see no reason to disturb this particular finding of fact, as

A the learned chairman had the opportunity to consider the credibility of the conflicting testimonies. The fact that En Badrul had been terminated on the morning of 29 December 2010 deprived him of the opportunity to tender his medical certificate for 28 December. Under s. 60F(2)(b) of the Employment Act 1955, an employee has 48 hours from the
B commencement of the sick leave to inform his employer of such leave. If he had not been terminated, En Badrul would have had until 8.45am on 30 December 2010 to inform AmBank, on the basis that his sick leave for 28 December would have commenced at the start of the work day (even though the medical certificate was in fact obtained later in the
C afternoon). Thus, if he had gone in to work at any time on 29 December and informed AmBank of his medical certificate for 28 December, he would have complied with the requirements of s. 60F(2)(b), and his absence on 28 December would not have been deemed to have been one that was without reasonable excuse. Of course, he was not able to do so, because he was informed that he was dismissed
D when he was on his way to work on 29 December 2010.

It will be noted that both s. 15(2) and s. 60F(2)(b) provide for timelines within which an employer must be informed of the excuse for absence. Under s. 15(2), an employer must be informed "prior to or at the earliest
E opportunity during such absence", whereas s. 60F(2)(b) specifies a period of 48 hours from when the sick leave commences. In my judgment, where the absence is the result of sick leave being taken, the applicable period is that provided in s. 60F(2)(b), on the basis of the principle *generalia specialibus non derogant*. The timeframe provided in s. 15(2) applies in all other cases; and

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(b) Section 13(2) of the Employment Act 1955 entitles an employer to terminate an employee's contract of service without notice in the event of any wilful breach of a condition of the contract of service. In this case, the employee had been ill. It is difficult to see how an illness could give
G rise to a wilful breach on the part of the employee. Perhaps if an employee had persistently and deliberately failed to inform the employer of his illness, a right may have arisen in favour of the employer entitling dismissal, but not otherwise.

In this case, even though En Badrul could be said to have been in breach
H of his terms of employment, such breach was not a wilful breach that entitled Ambank to terminate his services. Accordingly, the respondent's dismissal was without just cause or excuse.

[64] This does not mean that an employer cannot terminate an employee who, on account of illness, is incapable of or unsuited to performing the job
I for which he was employed. The case of *MHS Aviation Sdn Bhd v. Zainal Akmar Mohd Noor*[20] outlines the steps to be taken before a decision is made to dismiss an employee on account of ill-health.

[65] Counsel for the applicant argued that the Industrial Court had failed to give due consideration to the fact that En Badrul had previously been issued a warning letter for taking leave without informing AmBank and without reasonable excuse. In my judgment, due consideration had in fact been given to the circumstances leading to the issuance of the warning letter: see the award at p. 263 of encl. 3. The Industrial Court did not consider this to be a factor in its determination that no just cause or excuse existed for the dismissal. In my judgment, the fact that the applicant had previously issued a warning letter regarding sick leave and emergency leave taken by En Badrul does not change the fact that his dismissal had been premature, as the law clearly provides for 48 hours for an employee to inform an employer of his sick leave. This period had not yet expired when En Badrul was dismissed.

[66] It will be seen that, in coming to the findings above, I have reviewed the substantive merits of this case. In doing so, I do not consider myself to have overstepped the bounds of the supervisory jurisdiction of this court. It is well-established that, in exercising its powers of judicial review, the courts have the jurisdiction and power to substitute its own decision and can order consequential relief: *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh*[21]. In this particular case, the Industrial Court held that En Badrul had a reasonable excuse for his absence on 27 December 2010, which meant that it was no longer strictly necessary for the Industrial Court to come to a finding regarding the circumstances of absence on the following day, as there could not have been a cumulative absence of more than two consecutive workings days in order to trigger the deeming provision in s. 15(2) of the Employment Act 1955.

[67] This court ruled that the Industrial Court fell into error in making the finding that there existed reasonable excuse for the respondent's absence on 27 December 2010, as the effect of s. 60F(2) of the Employment Act 1955 had not been considered. But this did not mean that *certiorari* necessarily lay against the award. It still fell to this court to make a determination regarding the absence on 28 December 2010, and ultimately, the issue of whether the dismissal was with just cause and excuse. In order to do so, it became necessary for this court to delve into the substantive merits of the case.

Conclusion And Orders

[68] For the reason explained in the foregoing paragraphs, I find that:

(a) the learned Chairman of the Industrial Court had committed an error of law in failing to consider the effect of s. 60F(2) of the Employment Act 1955 in relation to the respondent's absence from work on 27 December 2010. Had she done so, she would have concluded that the respondent did not have any reasonable excuse for his absence;

(b) the respondent would have been precluded from adducing evidence regarding the purported fact that he had asked his wife to inform AmBank, his employer, of the fact that he had obtained a medical certificate for 28 December 2010, on the basis that such fact had not been pleaded; and

(c) nonetheless, having regard to the circumstances of the case, AmBank was not entitled to terminate the services of the respondent and therefore the dismissal was without just cause or excuse.

[69] The application for *certiorari* is therefore dismissed, with costs of RM3,000 for the respondent.

Endnotes:

1. Reported at *Badrul Kamar Baharum lwn. AmBank (M) Bhd* [2015] 3 ILR 34.
2. See the Notes of Evidence, at p. 23 of encl. 5.
3. See p. 264 of encl. 3.
4. [1997] 3 CLJ 235, [1997] 3 AMR 2585, [1996] 1 MELR 312, [2000] 7 MLJ 1.
5. See *Syn Lee & Co Ltd v. Bank of China* [1960] 1 LNS 133; [1962] MLJ 395, [1960] 1 MLRA 313.
6. [1981] 1 All ER 788, a decision of the Court of Appeal of England & Wales.
7. [1999] 1 CLJ 819, [1998] 3 AMR 2283, [1998] 2 MLJ 383, [1997] 4 MLRH 751.
8. See the Notes of Proceedings at p. 22 of encl. 5.
9. [2010] 3 CLJ 310, [2010] 1 AMR 523, [2009] 5 MLJ 770, [2009] 3 MLRA 597 (CA).
10. [2010] 8 CLJ 629, [2011] 3 AMR 38, [2010] 6 MLJ 1, [2010] 5 MLRA 696 (FC).
11. [1994] 3 CLJ 567, [1994] 3 AMR 1882, [1994] 3 MLJ 185, [1994] 1 MLRA 300.
12. See *Universiti Islam Antarabangsa Malaysia v. Nik Roskiman Abdul Samad & Anor* [2016] 1 LNS 297, [2016] AMEJ 1164, [2016] MLRHU 355, at para. 19.
13. See p. 262 of encl. 3.
14. [2009] 1 ILR 406.
15. [2001] 1 ILR 111.

16. (1920) AC 662.

17. The case was remitted back to the Industrial Court by the Court of Appeal for assessment of compensation: see *Tsuritani (M) Sdn Bhd, Melaka v. Sha'ari Sahat & Ors* [2006] 3 ILR 1554. The decision of the High Court can be found at [2003] 1 LNS 221, [2003] AMEJ 0116, [2003] MLJU 245, [2003] 5 MLRH 851.

18. [2000] 5 CLJ 307, [2000] 2 MLJ 282, [1999] 4 MLRH 526, AMEJ 0145.

19. [2004] 2 ILR 803, [2004] 2 MELR 398.

20. [2001] 2 ILR 336.

21. [1997] 2 CLJ 11, [1997] 1 AMR 1008, [1997] 1 MLJ 789, [1996] 2 MLRA 398.